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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON, MEDFORD DIVISION

In re: WATERS OF THE KLAMATH RIVER BASIN

KLAMATH IRRIGATION DISTRICT,

Movant,

v.

UNITED STATES BUREAU OF RECLAMATION,

Respondent.

Case Nos. 1:21-cv-00504-AA

REPLY IN SUPPORT OF MOTION TO REMAND MOTION FOR PRELIMINARY INJUNCTION TO STATE COURT

REQUEST FOR ORAL ARGUMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Federal Cases

TABLE OF AUTHORITIES (continued)

Page(s)

Federal Cases (continued)

TABLE OF AUTHORITIES (continued)

Page(s)

Federal Cases (continued)

TABLE OF AUTHORITIES (continued)

Page(s)

State Cases

Statutes

TABLE OF AUTHORITIES (continued)

Page(s)

Other Authorities

I. INTRODUCTION

The Government is inviting this Court onto infirm legal ground by asking it to find that federal law grants the Government rights to the use of stored water in Oregon's Upper Klamath Lake ("UKL") which are beyond the scope of the McCarran Amendment's waiver of sovereign immunity and, therefore, cannot be determined or enforced in the Klamath Adjudication. If this Court were to accept the Government's invitation, it would directly contravene Ninth Circuit precedent holding that the McCarran Amendment requires the Government to submit its water rights claims in the Klamath Basin to the Klamath Adjudication. It would also destroy the purpose, intent, and effect of the general stream adjudication process currently ongoing, which is to comprehensively determine *all state and federal* rights to the use of water in Oregon's Klamath Basin. This Court should decline the Government's invitation to dismantle settled law concerning the sufficiency of Oregon's general stream adjudication process under the McCarran Amendment, particularly where the Ninth Circuit has already spoken on this specific issue. Tens of thousands of individual claimants and the State of Oregon have spent more than 45 years trying to comprehensively determine all state and federal water rights in certain surface waters of the Klamath Basin. The ruling the Government is now requesting—that it might have other federal water rights *not* subject to the Klamath Adjudication—would mean that all that effort has been for naught.

The Government's central argument here is predicated on a fundamentally flawed contention: that the waiver of sovereign immunity in the McCarran Amendment pertains only to certain discrete issues of state water rights. In truth, the McCarran Amendment waived sovereign immunity as to the Government's participation in adjudications "of rights to the use of water of a river system or other source," which are *in rem* proceedings. 43 U.S.C. § 666(a)(1). A court sitting *in rem* does not assume jurisdiction of neatly cabined or discrete "issues": it assumes jurisdiction of *the property*, and it decides all rights, interests, and related issues in the property. This is the fundamental nature of an *in rem* proceeding, which the Klamath Adjudication inarguably is.

Further, the Government misstates both who bears the burden here and the relevant question for this Court. The Government, as the invoker of this Court's jurisdiction, bears the burden of showing it has jurisdiction. And the determination this Court must make is whether *it* has jurisdiction, not whether

the Klamath County Circuit Court has jurisdiction. The Klamath County Circuit Court must determine its own jurisdiction, and to the extent the Government disagrees with whatever that determination is, the proper remedy is appeal, not removal. In fact, the statute explicitly states that the United States "shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and *may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances*." 43 U.S.C. § 666(a) (emphasis added).

The question this Court must answer is whether the Klamath County Circuit Court has assumed prior exclusive jurisdiction of the *res* at issue here: the respective property rights of KID and Reclamation in UKL. If it has, this Court *must* remand it, because having assumed *in rem* jurisdiction, the property is wholly withdrawn from the jurisdiction of other courts. This serves basic and fundamental purposes, by preventing courts from issuing inconsistent directives about the existence, ownership, and attributes of particular property rights. And because Reclamation does not dispute that the Klamath County Circuit Court has acquired prior exclusive jurisdiction of the *res*, this Court must remand the motion.

The rest of the Government's arguments are irrelevant. KID does not assert—in the motion to remand, the motion for preliminary injunction, or anywhere else—that the Klamath County Circuit Court has exclusive jurisdiction over all issues that incidentally touch upon the waters of the Klamath Basin. Indeed, KID has participated in ongoing ESA litigation in the federal courts without objection, only reminding the Court that it should avoid rendering a decision that purports to "allocate" the water in UKL, as doing so might interfere with the property rights determinations in the Klamath County Circuit Court. But the ESA is not, at its heart, concerned with property rights. It does not grant the Government any rights or powers the agency does not otherwise have. Instead, the ESA directs the agency to discharge its already-existing powers to aid endangered species and prohibits agencies from taking or jeopardize listed species through discretionary actions. Put slightly differently, the ESA is a source of agency *obligations*, not agency *rights*. Therefore, ongoing litigation to determine Reclamation's obligations under the ESA simply says nothing about what Reclamation's rights are, or how it must go about acquiring the property or rights it needs to meet those obligations.

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The Government's arguments should be rejected, and this matter should be remanded to the Klamath County Circuit Court.

II. ARGUMENT

A. The Party Invoking the Federal Court's Jurisdiction Has the Burden of Showing Jurisdiction

The Government attempts to flip the well-established and well-recognized burden inherent in showing jurisdiction on its head: it is the *Government*, not KID, who bears the burden of establishing that this Court's jurisdiction is appropriate. The party invoking a federal court's jurisdiction always bears the burden of showing that jurisdiction is appropriate. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 n.3 (2006) ("[T]he party asserting federal jurisdiction when it is challenged has the burden of establishing it."); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (noting that "[t]he party invoking federal jurisdiction bears the burden" of establishing jurisdiction); *California ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 838 (9th Cir. 2004) ("[T]he burden of establishing federal jurisdiction falls to the party invoking the statute."); *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992) ("[T]he defendant always has the burden of establishing that removal is proper."); *Ethridge v. Harbor House Rest.*, 861 F.2d 1389, 1393 (9th Cir. 1988) ("The party invoking the removal statute bears the burden of establishing federal jurisdiction."); *Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1195 (9th Cir. 1988) ("The burden of establishing federal jurisdiction is upon the party seeking removal."); *Garza v. Brinderson Constructors, Inc.*, 178 F.Supp.3d 906, 910 (N.D. Cal. 2016) ("Brinderson, as the removing party, has the burden of establishing a prima facie showing of federal jurisdiction.").

The Government's removal of KID's motion to federal court pursuant to 28 U.S.C. § 1442 does not shift the Government's burden of demonstrating subject matter jurisdiction onto KID. *See State Eng'r of State of Nevada v. S. Fork Band of Te-Moak Tribe of W. Shoshone Indians of Nevada*, 339 F.3d 804, 809 (9th Cir. 2003) ("[S]ection 1442 is not a trump. If there are specific jurisdictional bars elsewhere that prevent the district court from asserting jurisdiction, the general removal provision cannot overcome the jurisdictional defect.").

What the Government is really trying to argue here is that it is KID's burden to show this court that *the state court* has jurisdiction. The argument is ludicrous and should be rejected. First, the state

court clearly has jurisdiction. The Ninth Circuit told the Government almost three decades ago that the Klamath Adjudication had jurisdiction over all federal water rights in the Klamath Basin. *See United States v. Oregon*, 44 F.3d 758, 770 (9th Cir. 1994). The Government's real concern is a hypothetical one, namely: that the order of the state court on the preliminary injunction motion *might* exceed its jurisdiction. This concern is unfounded because, as explained below, *in rem* jurisdiction attaches to *property*, not *issues*. That concept is fully consistent with the McCarran Amendment's waiver of sovereign immunity.

More importantly, however, it is well recognized that courts generally have the power to determine their own jurisdiction. *See United States v. Ruiz*, 536 U.S. 622, 628 (2002) ("[I]t is familiar law that a federal court always has jurisdiction to determine its own jurisdiction."); *United States v. United Mine Workers of America*, 330 U.S. 258, 291 (1947) ("It and it alone necessarily had jurisdiction to decide whether the case was properly before it."); *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 377 (1940) ("The court has the authority to pass upon its own jurisdiction."); *Novich v. McClean*, 172 Or.App. 241, 249 n.3 (2001) ("[I]t is a common practice for courts to determine that they have jurisdiction before proceeding to the merits of a case."); *SAIF Corp. v. Reddekopp*, 137 Or.App. 102, 107 (1995) (recognizing the Workers Compensation Board has "jurisdiction to determine whether a claim comes within its own motion jurisdiction"); *cf. Northern Ins. Co. of New York v. Conn. Organ Corp.*, 40 Or.App. 785, 791 (1979) ("We are required to examine our own jurisdiction even if the parties do not challenge it."). Just as it is this Court's prerogative to determine whether the U.S. District Court for the District of Oregon has jurisdiction over the motion, it is the Klamath County Circuit Court's prerogative to determine its own jurisdiction. This Court does not sit to review whether the Klamath County Circuit Court has jurisdiction. Again, the Ninth Circuit also expressly addressed this, noting the appropriate procedure to be followed if the Government believes that the Klamath Adjudication fails to respect federal law: "[I]n administering water rights the State is compelled to respect federal law regarding federal reserved rights *and to the extent it does not, its judgments are reviewable by the Supreme Court.*" *United States v. Oregon*, 44 F.3d 758, 770 (9th Cir. 1994) (emphasis added).

The Klamath County Circuit Court clearly has jurisdiction over the water rights at issue. Even if the Government is concerned the state court *might* issue a decision that over-reaches that jurisdiction,

it is the Klamath County Circuit Court that must evaluate its own jurisdiction, with an appeal lying ultimately to the Supreme Court. *This* Court's role on a motion to remand is to evaluate its own jurisdiction, not the jurisdiction of the state court.

B. The Waiver of Sovereign Immunity in the McCarran Amendment Extends to All Water Rights, Regardless of Whether Those Rights Are Based on Federal Statute, Executive Order, Treaty, or Contract

The Government argues, applying the general principle that waivers of sovereign immunity are narrowly construed, that the McCarran Amendment's waiver grants the state court the ability to decide only issues of *state* water rights, and does not grant it the ability to decide issues related to, or to determine the existence or extent of, *federal* water rights. In essence, the Government is arguing that it has water rights in UKL that are created by other sources of federal law which were not subject to the Klamath Adjudication, naming, specifically, the Endangered Species Act, tribal trust obligations to the Hoopa Valley and Yurok Tribes in California, and federal contracts with irrigators. This is simply not true, as well-established Supreme Court and Ninth Circuit precedent shows: to the extent that the Government had any federal water rights in UKL, whether they were reserved by statute, by treaty, by executive order, or by contract, it was required to submit them to the Klamath Adjudication. It may not now seek to collaterally attack the water rights determinations made in the Klamath Adjudication.

The waiver of sovereign immunity within the McCarran Amendment inarguably extends to federal water rights. The Supreme Court clearly established this in *Eagle County*, holding that the McCarran Amendment was "an all-inclusive statute concerning 'the adjudication of rights to the use of water of a river system' which in § 666(a)(1) has no exceptions and which, as we read it, includes appropriate rights, riparian rights, and *reserved rights*." *United States v. District Court In and For Eagle County* ("*Eagle County*"), 401 U.S. 520, 524 (1971) (emphasis added). The Supreme Court again reiterated this in *Colorado River*, holding that the state court also had "jurisdiction over Indian water rights under the [McCarran] Amendment," which are federal reserved rights. *Colorado River Water Cons. Dist. v. United States*, 424 U.S. 800, 809 (1976); *see also United States v. White Mountain Apache Tribe*, 784 F.2d 917, 918–19 (9th Cir. 1986) ("[T]he McCarran Amendment removed any limitation on state court jurisdiction over Indian water rights that might have been imposed by statehood Enabling Acts or general federal Indian policy."). Similarly, the Ninth Circuit specifically found that the Klamath

Adjudication, in particular, was "in fact the sort of adjudication Congress meant to require the United States to participate in when it passed the McCarran Amendment." *United States v. Oregon*, 44 F.3d 758, 770 (9th Cir. 1994). Even there, the Ninth Circuit commented that, "in administering water rights the State is compelled to respect federal law regarding federal reserved rights and to the extent it does not, its judgments are reviewable by the Supreme Court." *Id.* Clearly, adjudication of the existence and scope of federal reserved rights—regardless of whether the basis for those rights is based on statute, treaty, executive order, or contract—falls within the McCarran Amendment.

The reason for subjecting federal water rights to comprehensive state adjudications in the McCarran Amendment was to prevent precisely what the Government is attempting to do with this removal: the piecemealing of adjudication about who holds what right to use water. Avoiding this piecemealing was expressly the intent of the McCarran Amendment. *See Colorado River*, 424 U.S. at 811 ("It is apparent that if any water user claiming to hold such right by reason of the ownership thereof by the United States or any of its departments is permitted to claim immunity from suit in, or orders of, a State court, such claims could materially interfere with the lawful and equitable use of water for beneficial use by the other water users who are amenable to and bound by the decrees and orders of the State courts."); *id.* at 819 ("The clear federal policy evinced by that legislation is the avoidance of piecemeal adjudication of water rights in a river system."); *Eagle County*, 401 U.S. at 525 (quoting Senator McCarran as saying the amendment was necessary "because unless all of the parties owning or in the process of acquiring water rights on a particular stream can be joined as parties defendant, any subsequent decree would be of little value"); *Jicarilla Apache Tribe v. United States*, 601 F.2d 1116, 1130 (10th Cir. 1979) ("The legislative history of the McCarran Amendment giving consent to join the United States manifests the Congressional intent to accomplish in one forum the general settlement of water rights of many users of a river system or other source."); *Frenchman Cambridge Irr. Dist. v. Heineman*, 974 F.Supp.2d 1264, 1276 (D. Neb. 2013) ("The McCarran Amendment was intended to avoid piecemeal adjudication of water rights.").

Accordingly, courts have noted that overly narrow or technical cabining of the waiver of sovereign immunity is not appropriate when construing the McCarran Amendment. In fact, when the Government was originally trying to avoid the Klamath Adjudication in the early 1990s, this Court held

that the Supreme Court had "declined to limit the McCarran Amendment's waiver via a technical application or narrow interpretation, thereby allowing the McCarran Amendment's underlying policy to take precedent." *United States v. Oregon Water Res. Dep't*, No. 90–1329–FR, 1992 WL 176154, at *7 (D. Or. July 10, 1992) (internal citations omitted). In rejecting arguments from both the Klamath Tribes and Reclamation, this Court held, "[t]he clear intent of Congress in enacting the McCarran Amendment was to create a comprehensive waiver of sovereign immunity in order to adjudicate water rights," and therefore "the technical arguments advanced by the United States and the Tribe, as well as their assertion that a strict construction of the McCarran Amendment is the rule, would, if accepted, thwart the goal of the McCarran Amendment in ways not envisioned by Congress." *Id.* at *7–8. This view—that the Amendment should not be construed so narrowly as to render it nugatory—has been reiterated by the Supreme Court on multiple occasions. *See United States v. Idaho*, 508 U.S. 1, 7 (1993) (rejecting the Government's argument that the McCarran Amendment subjects it only to *substantive* state water law, and not procedural law, and noting the Court had "rejected a similarly technical argument of the Government in construing the McCarran Amendment" in *Eagle County*).

The Klamath Adjudication is clearly empowered to determine federal water rights. To the extent the United States believed that it had federal water rights in UKL—whether created by the Endangered Species Act, or the Executive Orders creating the Hoopa Valley or Yurok reservations in California, or various federal contracts it has entered—it was required to submit those in the Klamath Adjudication. This is what it means for an adjudication to be *comprehensive*—to prevent claims such as these from later surfacing and interfering with the adjudicating court's ability to resolve all issues of water rights in particular water sources in a single forum. Absent this ability, the decades-long Klamath Adjudication is meaningless, as it does not fully and finally dispose of who owns the rights to use water in UKL and the Klamath River. *See Colorado River*, 424 U.S. at 811; *id.* at 819; *Eagle County*, 401 U.S. at 525; *Jicarilla Apache Tribe*, 601 F.2d at 1130; *Frenchman Cambridge Irr. Dist.*, 974 F.Supp.2d at 1276. Contrary to what the Government is arguing here, the Ninth Circuit has expressly held that "all existing water rights in the river system will have been determined when the adjudication is finished." *United States v. Oregon*, 44 F.3d 758, 768 (9th Cir. 1994).

In truth, the Government is simply trying to re-litigate issues that have been long-decided, such as whether it needed to bring *all* federal water rights claims in UKL to the Klamath Adjudication. It did. *See United States v. Oregon*, 44 F.3d 758, 770 (9th Cir. 1994); *see also* ORS 539.010(7) ("In any proceeding to adjudicate water rights under this chapter, the Water Resources Department may adjudicate federal reserved rights for the water necessary to fulfill the primary purpose of the reservation or any federal water right not acquired under ORS chapter 537 or ORS 540.510 to 540.530."). These attempts to argue that other sources of federal law permit it to use stored water in Oregon in a way it clearly has no right to under the Klamath Adjudication are simply attempting an end-run around the Ninth Circuit's prior holding. The Government may not do this. The purpose of the Klamath Adjudication was to *comprehensively* adjudicate water rights in the Klamath Basin. And it has done this.

Moreover, the United States concedes that the McCarran Amendment *also* waives sovereign immunity to *administer* the water rights found in the Klamath Adjudication. ECF No. 17 at 19[1] ("Accordingly, with the issuance of the ACFFOD, the KBA now has jurisdiction over the enforcement of the water rights determined therein as among competing water right claimants in Oregon"). This is precisely what KID seeks to do in the underlying motion: seek an orderly administration of the rights that have been found during the pending judicial stage of the proceeding. Oregon law mandates that the findings in the ACFFOD are fully enforceable unless and until stayed by the Klamath County Circuit Court. *See* ORS 539.170; ORS 539.180. Any stay must be conditioned upon the posting of a bond. ORS 539.180. And the Supreme Court has *specifically* upheld these provisions of Oregon's water adjudication process: "[W]e think it is within the power of the state to require that, pending the final adjudication, the water shall be distributed according to the board's order, unless a suitable bond be given to stay its operation." *Pac. Live Stock Co. v. Lewis*, 241 U.S. 440, 455 (1916).

Reclamation has neither sought nor obtained a stay, and has not posted a bond, and yet continues to flout the terms of the ACFFOD. The McCarran Amendment *expressly* contemplates two separate kinds of cases falling under its ambit: (1) suits for "the adjudication of rights to the use of water of a

[1] Page citations refer to the page of the document within the Court's CM/ECF system, not the independent pagination within the document.

river system or other source; and (2) suits for "the administration of such rights." 43 U.S.C. § 666(a)(1)–(2). Here, KID filed its motion in the Klamath Adjudication to enforce water rights determined therein as among competing water right claimants from the same source in accordance with Oregon's general stream adjudication statutes. Thus, KID's motion is within the scope of both prongs of the McCarran Amendment. *See Eagle County*, 401 U.S. at 524 ("'[T]he administration of such rights' in § 666(a)(2) must refer to the rights described in (1) for they are the only ones which in this context 'such' could mean."); *San Luis Obispo Coastkeeper v. Dep't of Interior*, 394 F.Supp.3d 984, 994 (N.D. Cal. 2019) ("[S]ubsection (a)(2) pertains to the administration of adjudicated rights under subsection (a)(1)."); *United States v. Hennen*, 300 F.Supp. 256, 263 (D. Nev. 1968) ("Once there has been such an adjudication and a decree entered, then one or more persons who hold adjudicated water rights can, within the framework of § 666(a)(2), commence among others such actions as described above, subjecting the United States, in a proper case, to the judgments, orders and decrees of the court having jurisdiction."). Additionally, Reclamation is required to follow the directives of the Oregon water rights adjudication statute, and thus may not circumvent the ACFFOD without seeking and obtaining a stay and posting a bond. *See Pac. Live Stock Co.*, 241 U.S. at 455; *see also California v. United States*, 438 U.S. 645, 647, 666–76 (1978) (holding that Reclamation is required to abide by state law-based conditions on water rights it appropriates). These statutory requirements are important to preserving due process and protecting parties like KID, who have now had their water rights determined, from having those same rights violated. *Skinner v. Jordan Valley Irr. Dist.*, 137 Or. 480, 491 (1931), *opinion modified on denial of reh'g,* 137 Or. 480 (1931) ("The right to the use of water constitutes a vested property interest which cannot be divested without due process of law."

The Government has waived sovereign immunity insofar as this motion is concerned, and the Klamath County Circuit Court retains jurisdiction to administer those water rights found in the Klamath Adjudication.

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C. *The Government Misstates the Inquiry for the Court: the Question Is Whether the State Court Has Jurisdiction Over the* Res

The Government suggests that the relevant question the Court must answer on this motion to remand is whether the Klamath County Circuit Court has "prior exclusive jurisdiction over *the issues* raised by the PI Motion." (Doc. No. 20 at 8 [emphasis added].) This is wrong.

The prior exclusive jurisdiction of a court does not attach to discrete "issues" in a litigation—it attaches to a *res*, i.e., a body of property. That is the clear meaning and intent behind the prior exclusive jurisdiction doctrine. *See Chapman v. Deutsche Bank Nat'l Trust Co.*, 651 F.3d 1039, 1043 (9th Cir. 2011) (noting the prior exclusive jurisdiction doctrine "holds that 'when one court is exercising *in rem* jurisdiction over a *res*, a second court will not assume *in rem* jurisdiction over the same *res*'") (quoting *Marshall v. Marshall*, 547 U.S. 293, 311 (2006)); *Sexton v. NDEX West, LLC*, 713 F.3d 533, 536 (9th Cir. 2013) ("[I]f a state or federal court 'has taken possession of property, or by its procedure has obtained jurisdiction over the same,' then the property under that court's jurisdiction 'is withdrawn from the jurisdiction of the courts of the other authority as effectually as if the property had been entirely removed to the territory of another sovereign.'") (quoting *State Engineer v. S. Fork Band of Te-Moak Tribe of W. Shoshone Indians*, 339 F.3d 804, 809 (9th Cir. 2003)). "If the action is not 'strictly in personam'—that is, if the action is *in rem* or *quasi in rem*—then the doctrine ordinarily applies." *Chapman*, 651 F.3d at 1044. Moreover, the prior exclusive jurisdiction doctrine applies to cases removed under the federal officer removal statute. *State Engineer*, 339 F.3d at 809 ("[S]ection 1442 is not a trump. If there are specific jurisdictional bars elsewhere that prevent the district court from asserting jurisdiction, the general removal provision cannot overcome the jurisdictional defect.").

When an action is pursued *in rem*, "it 'determine[s] interests in specific property as against the whole world.'" *Goncalves by and through Goncalves v. Rady Children's Hosp. San Diego*, 865 F.3d 1237, 1254 (9th Cir. 2017) (quoting *State Eng'r*, 339 F.3d at 811); *see also* Black's Law Dictionary 793 (6th ed. 1990) (defining an *in rem* proceeding as one in which the purpose of the "suit is to determine title to or to affect interests in specific property located within territory over which court has jurisdiction"). Therefore, when a court exercises *in rem* jurisdiction, it is not merely exercising jurisdiction over neatly cabined and discrete "issues" in a particular litigation. It is exercising jurisdiction over the *property*, and may resolve whatever issues are necessary to resolve to determine

the rights and interests of *any* claimant in the property. *See Hanson v. Denckla*, 357 U.S. 235, 246 n.12 (1958) ("A judgment in rem affects the interests of *all persons* in designated property.") (emphasis added); *United States v. 12126 N.W. Skyline Road*, No. Civ. 97–127–FR, 1998 WL 426132, at *1 (D. Or. July 24, 1998) (noting the Government sought a judgment against "defendant real property . . . , in rem, and *all persons claiming any right, title or interest in defendant real property*") (emphasis added); *Hunter v. West Linn-Wilsonville Sch. Dist. 3JT*, 173 Or.App. 514, 518 (2001) ("An in rem proceeding, by its very nature, 'is conclusive and binding upon all persons who may have or claim *any right or interest* in the subject matter of the litigation.'") (quoting *Masterson v. Pac. L.S. Co.*, 144 Or. 396, 402 (1933)) (emphasis added); *Weller v. Weller*, 164 Or.App. 25, 35–36 (1999) (noting that, where an Oregon court had acquired *in rem* jurisdiction over personal marital property, that jurisdiction persists to resolve all issues related to that property, even if the marriage is dissolved in another state). Courts having jurisdiction over property may determine *all* rights and interests in that property, whatever the source of that right.

This fits entirely within our system of federalism and dual sovereignty. The American legal system presumes that states possess concurrent sovereignty with the federal Government, subject only to the Supremacy Clause. "Under this system of dual sovereignty, we have consistently held that state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States." *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990). In fact, state courts are not just permitted to decide issues of federal law, but are affirmatively *bound* to enforce it, and may not refuse or decline to consider federal law. *See Testa v. Katt*, 330 U.S. 386, 394 (1947). The Government knows this: again, the Ninth Circuit said so in connection with the Klamath Adjudication back in 1994 when it noted, "in administering water rights the State is compelled to respect federal law regarding federal reserved rights and to the extent it does not, its judgments are reviewable by the Supreme Court." *United States v. Oregon*, 44 F.3d at 770.

This also entirely comports with the waiver of sovereign immunity under the McCarran Amendment. Recall that the goal of the McCarran Amendment was to allow *all* water rights claims—whether they came from claims of appropriation, riparian entitlement, or reserved rights—to be adjudicated in a single forum. *See Colorado River*, 424 U.S. at 811; *id.* at 819; *Eagle County*, 401 U.S.

at 525; *Jicarilla Apache Tribe*, 601 F.2d at 1130; *Frenchman Cambridge Irr. Dist.*, 974 F.Supp.2d at 1276. In making this determination, Congress clearly operated against a background understanding of what an *in rem* proceeding is, and knew these comprehensive state water rights adjudications would determine *all* rights to the use of water in a particular water source. *See Colorado River*, 424 U.S. at 819 (noting that "the clear federal policy evinced" by the McCarran Amendment "is akin to that underlying the rule requiring that jurisdiction be yielded to the court first acquiring control of property"); *FAA v. Cooper*, 566 U.S. 284, 292 (2012) (noting that when Congress uses well-established legal concepts or terms of art, it "presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken").

The Government fundamentally misunderstands the doctrine of prior exclusive jurisdiction. The Klamath County Circuit Court did not assume jurisdiction over discrete issues. It assumed jurisdiction over the *res*, i.e., the property rights in UKL and the Klamath Basin. Because it has jurisdiction over the *res*, it has jurisdiction to determine all rights and interests in the *res*, regardless of their source. KID simply seeks to have the rights that have already been found to exist administered, which falls squarely within the McCarran Amendment's waiver of sovereign immunity and the Klamath County Circuit Court's prior exclusive jurisdiction.

D. There Is No Issue of Federal Law to Be Decided Here

The Government attempts to make up in repetition and straw man arguments what it lacks in legal authority, stating *ad nauseam* that the waiver of sovereign immunity in the McCarran Amendment does not extend to every issue that touches upon water or water law, again identifying the requirements of the Endangered Species Act, California-based tribal reserved rights, and federal contracts between the Government, KID, and other project water users. Fortunately, none of these actually pose issues of federal law that need to be decided as part of this motion for preliminary injunction.

i. <u>The Government Cites No Authority Establishing that the Endangered Species Act Grants It Rights, Instead of Imposing Obligations</u>

The Government appears to take issue with the idea that the state court might issue some ruling that in some way references the Endangered Species Act or the Government's obligations thereunder. However, the Government has cited no authority suggesting that the ESA either could or has created

water rights for the Government. In fact, the Government acknowledges that the water rights determinations in the Klamath Adjudication do not "grant it a water right for instream ESA purposes in Oregon." ECF No. 20 at 20. The reason for this is obvious: that is not what the ESA does. As such, the Government has not articulated any issue under the ESA that the state court is being asked to resolve in KID's preliminary injunction motion.

The ESA imposes obligations on federal agencies, but it does not expand the authority of agencies to act beyond the power the agency otherwise possesses. *See Sierra Club v. Babbitt*, 65 F.3d 1502, 1510 (9th Cir. 1995) ("[The ESA] directs agencies to 'utilize their authorities' to carry out the ESA's objectives; it does not expand the powers conferred on an agency by its enabling act.'") (quoting *Platte River Whooping Crane v. FERC*, 962 F.2d 27, 34 (D.C. Cir. 1992)). The D.C. Circuit described as "far-fetched" the argument that the general consultation requirements of the ESA expand agencies' authority to act beyond their enabling acts. *See Platte River Whooping Crane*, 962 F.2d at 34; *see also Am. Forest & Paper Ass'n v. U.S. EPA*, 137 F.3d 291, 299 (5th Cir. 1998) ("We agree that the ESA serves not as a font of new authority, but as something far more modest: a directive to agencies to channel their *existing* authority in a particular direction.") Instead of granting new rights or powers to agencies, the ESA requires the agency to discharge the discretionary powers it was given in other statutes in accordance with the ESA. *See* 16 U.S.C. § 1536(a)(2).

The Government has presented no authority whatsoever that the ESA has given it any water rights. Nor could it, as courts have routinely rejected the idea that the ESA is a font of agency power rather than agency obligations. *See Am. Forest & Paper Ass'n*, 137 F.3d at 299; *Sierra Club*, 65 F.3d at 1510; *Platte River Whooping Crane*, 962 F.2d at 34. Therefore, to the extent the Government argues that the state court may not decide this issue, it is a red herring. The issue has already been decided by the Ninth Circuit (and others). The Government may have obligations under the ESA, but it does not gain new powers or rights thereby. The Government presents no authority suggesting there is a disputed legal issue for the state court to resolve on this topic. Reclamation's obligation to avoid causing jeopardy to a species does not grant it a right to use water contrary to the water right determinations in the Klamath Adjudication. To the extent the Government has ESA obligations, but does not currently have the water rights necessary to meet those obligations, the Government can *still* meet those obligations in any

number of lawful ways. It can seek a stay and post a bond under Oregon state law. *See* ORS 539.130(4); ORS 539.170; ORS 539.180. It can purchase, lease, or license water rights from rights-holders such as KID. It can compensate irrigators to forbear on exercising their water rights, so that excess water is available for flushing down the Klamath River. But this requires no analysis under the ESA: the ESA imposes whatever obligations it imposes, but it does not grant the Government new water rights it otherwise does not possess. KID's motion is about the Government's repeated and unilateral decision to grant itself a stay of the ACFFOD and simply take water it has no rights to. It does not attempt to determine what the Government's ESA obligations are.

More importantly, the Government has *already* litigated its claim that it has water rights entitling it to use water stored in UKL for non-irrigation purposes in the Klamath Adjudication. OWRD initially issued a Findings of Fact and Order of Determination in 2013, in which it found both that "[t]he water right of the Klamath Project is not limited to irrigation purposes" and Reclamation's "claim for water for non-irrigation purposes does not violate state or federal law." *See* KA-1000, Klamath Adjudication, KBA_ACFFOD_07050.[2] However, OWRD then issued an Amended and Corrected Findings of Fact and Order of Determination in 2014—commonly referred to as the "ACFFOD"—which *specifically removed both of those findings*. *See id.* Notably, in OWRD's corrected findings, it specifically restricted the Government's rights, noting "[t]he purposes of the Project properly include: irrigation, livestock watering, and domestic use, and use of water for storage." *Id.* It also ruled that Reclamation's "claim for irrigation for the purpose of the growth of wetland plants ***is not consistent*** with the purposes of use identified in the May 19, 1905 Notice or the Reclamation Act of 1902." *Id.* (emphasis added). Notably, OWRD found that Reclamation's desire to use water for environmental purposes—here, to "create permanently and seasonally flooded wetlands for the growth of wetland plants" to support an "exceptional number of birds and abundant wildlife"—was "an attempt to create continuity with historic conditions on the place of use, rather than a physical change in the historic conditions made to increase the usability of the land." *Id.* This proposed use was "not consistent with the plain meaning of the term 'reclamation.'" *Id.*

[2] Available at https://www.oregon.gov/owrd/programs/WaterRights/Adjudications/KlamathRiverBasinAdj/Pages/ACFFOD.aspx.

In other words, the Government has *already* asserted that it has the right to use water for environmental purposes in the Klamath Adjudication, and that claim has already been rejected in the Klamath Adjudication. For the Government to now claim that these decisions are outside of the Klamath Adjudication's jurisdiction is highly disingenuous. Moreover, even if they were, the remedy is not to remove the question to federal court. As the Ninth Circuit noted, the Government's recourse consists of appeal. *United States v. Oregon*, 44 F.3d 758, 770 (9th Cir. 1994) ("[I]n administering water rights the State is compelled to respect federal law regarding federal reserved rights and to the extent it does not, *its judgments are reviewable by the Supreme Court.*") (emphasis added).

ii. California Water Rights Cannot Call on Oregon Water Rights, and Neither the Klamath County Circuit Court nor This Court Has Jurisdiction to Decide Interstate Water Rights Disputes; Only the Supreme Court Does

While the Government invariably refers to its ESA obligations in the same breath as its tribal trust obligations to the Hoopa Valley and Yurok Tribes, they are legally distinct concepts. Regardless, neither the Klamath County Circuit Court, nor this Court, nor Reclamation, can decide issues of priority between California water rights holders and Oregon water rights holders. Such issues must be raised in interstate water rights adjudications seeking equitable apportionment of the shared waterway between the co-equal sovereigns.

It bears noting that neither the Hoopa Valley nor the Yurok Tribe holds a water right in Oregon. The Government contends no differently. Neither tribe, nor the Government on their behalf, submitted a claim in the Klamath Adjudication.[3] And again, the Klamath Adjudication encompassed *all* federal water rights in Oregon, meaning that any federal reserved water right *must* have been raised in that proceeding. *See Colorado River*, 424 U.S. at 811; *Eagle County*, 401 U.S. at 525; *United States v. Oregon*, 44 F.3d at 770 (9th Cir. 1994). Moreover, the mere fact that the Hoopa Valley and Yurok tribes are physically located in California does not mean they were *barred* from participating in the Klamath Adjudication. Indeed, numerous California-based claimants, including a number of California-based irrigation districts such as Tulelake Irrigation District, and federal wildlife refuges in California, filed

[3] Conversely, other tribes did submit water rights claims in the Klamath Adjudication. For instance, the Klamath Tribes submitted a claim for in-stream water uses in the Klamath River outside of their reservation. *See In re: Waters of the Klamath River Basin*, Court's Opinion and Conclusions of Law on Phase 3, Part 1, Group C Motions, at 12 (Klamath County Circuit Court, Feb. 24, 2021). Although the Court found that the Klamath Tribes do not have such instream rights in the Klamath River, based on the language of the Treaty, it is clear that such rights are capable of resolution in the Klamath Adjudication.

claims *and were awarded water rights to the water in UKL* under the ACFFOD. *See* KA-1000, Klamath Adjudication, KBA_ACFFOD_07062–63, 07068, 07085–86.[4] If the Tribes believed they had a specific right to divert water from UKL, they were free to participate in the Klamath Adjudication, just as other California claimants did. But they did not, and do not have any Oregon water rights.

What the Government appears to now be asserting is slightly nuanced: that the downstream tribes, while not holding any Oregon water rights, hold a federal right in *California* to certain flows in the Klamath River. That may be true. KID is unaware of any adjudication or quantification of the Tribes' California water rights, but assumes *arguendo* that the Tribes' California water rights exist.

However, it is axiomatic that a water right in one state may not be called upon to satisfy a water right held in a different state, because the rights exist pursuant to different sets of laws issued and administered by co-equal sovereigns. *See Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938) ("For whether the water of an interstate stream must be apportioned between the two States is a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive."); *Vineyard Land & Stock Co. v. Twin Falls Salmon River Land & Water Co.*, 245 F. 9, 26 (9th Cir. 1917) ("[I]t is not for individual users to raise a controversy about the use of such water in another state, out of the territorial jurisdiction of the court."); *El Paso County Water Imp. Dist. No. 1 v. City of El Paso*, 133 F.Supp. 894, 924 (1955) (noting "the impotency of the New Mexico appropriation in Texas"); *Finney County Water Users' Ass'n v. Graham Ditch Co.*, 1 F.2d 650, 651 (D. Colo. 1924) ("The Supreme Court has said that neither state can impose its policy upon the other, and, when the action of one state reaches through the agency of natural laws into the territory of another state, the question of the extent and limitations of the rights of the two states may be inquired into."); Erwin Chemerinsky, Federal Jurisdiction § 6.2.5 (3d ed. 1999) ("Obviously, in a conflict between two states, neither states' laws can be applied to resolve the dispute.").

Interstate water rights disputes—where a downstream state and its constituents believe they are receiving insufficient water from a shared waterway because of diversions in an upstream state—are resolved through either equitable apportionment or interstate compact, to which only the states and not

[4] Available at https://www.oregon.gov/owrd/programs/WaterRights/Adjudications/KlamathRiverBasinAdj/Pages/ACFFOD.aspx.

the individual water users are parties. *See South Carolina v. North Carolina*, 558 U.S. 256, 280 (2010) ("A State's citizens also need not be made parties to an equitable apportionment action because the Court's judgment in such an action does not determine the water rights of any individual citizen."); *Colorado v. New Mexico*, 459 U.S. 176, 182 n.9 (1982) (noting that a suit for equitable apportionment between states is not barred by Eleventh Amendment immunity against lawsuits by citizens of another state). Once the waters of an interstate water source are equitably apportioned between the states, *then* state law operates to divide whatever water that state is entitled to amongst its citizens. *See Nebraska v. Wyoming*, 325 U.S. 589, 627 (1945) ("The equitable share of a State may be determined in this litigation with such limitations as the equity of the situation requires and irrespective of the indirect effect which that determination may have on individual rights within the State."); *Hinderlider*, 304 U.S. at 106–08 (noting that once an equitable apportionment has occurred, "the apportionment is binding upon the citizens of each State and all water claimants, even where the State had granted the water rights before it entered into the compact").

KID does not assert water rights in Oregon are entitled to priority over water rights in California. But the reverse is also true: water rights in California are not entitled to priority over water rights in Oregon. They are rights that exist within the jurisdictions of different sovereigns, and neither is permitted to invade the rights of the other. California water rights cannot be used to curtail KID's Oregon water rights. To the extent the Government suggests it may invoke California water rights to justify stripping Oregon water rights holders of their rights, it is wrong. Indeed, it is deeply ironic for the Government to suggest that, because the Yurok and Hoopa *declined* to claim any water rights in UKL in the Klamath Adjudication, it may now freely take water from UKL on their behalf. This is obviously wrong. The only suitable avenue for resolution of interstate water rights disputes is an equitable apportionment action between the *States*, not between individual users in the two states and not by Reclamation fiat. Neither the Klamath County Circuit Court, this Court, nor Reclamation on its own have the jurisdiction or authority to resolve interstate water rights disputes.

Note too that even if these California water rights have their basis in federal law as federal rights, it does not change the analysis. Tribal water rights must be satisfied by the State in which the reservation lies. Tarlock, *Interstate Allocation § 10:13*, LAW OF WATER RIGHTS AND RESOURCES, at 644, discussing

Arizona v. California, 373 U.S. 546 (1963); *see also Arizona v. California*, 460 U.S. 605, 628 (1983) ("Our 1963 opinion bore this out: perfected rights for the use of federal establishments were charged against the state's apportionment."); *Arizona v. California*, 373 U.S. 546, 601 (1963) ("Finally, we note our agreement with the Master that all uses of mainstream water within a State are to be charged against that State's apportionment, which of course includes uses by the United States."). Therefore, once the waters of the Klamath River are equitably apportioned between Oregon and California, the water demands of the Hoopa Valley and Yurok Tribe would be satisfied from *California's* share of the water, not Oregon's.

To the extent that the Government is now asserting that there is a dispute between water rights allocated to two different states, the proper remedy lies in seeking an equitable apportionment.

iii. KID Asserts No Rights Based on Federal Contracts, and the Government Does Not Explain Why Federal Contracts Would Be Implicated Here

The Government also mentions, at several points, that it has federal contracts with KID and/or other Klamath Project irrigators. The Government does not explain why this is relevant. KID's motion does not seek to vindicate a contractual right to water, but rather a property right found under Oregon state law in the Klamath Adjudication. Nor has the Government suggested that its contracts with KID and others grant it a right to divert stored water out of UKL through Link River Dam and use it to artificially enhance instream flows in the Klamath River in California. Whatever the Government means to insinuate, it should be disregarded.

E. The Court Should Reject the Government's Strawman Arguments, and Recognize KID's Motion for What It Is: An Attempt to Enforce the Water Rights Found in the ACFFOD and State Procedural Law

Perhaps most notable about the Government's opposition is that it nowhere disputes that the Klamath County Circuit Court has prior exclusive jurisdiction over the property rights KID now seeks to have administered. In fact, nowhere in its opposition to either the motion to remand or its notice of removal does the Government even reference or acknowledge the state procedural statutes KID invokes in its preliminary injunction motion. This is because the Government cannot argue with the basic principle of KID's motion: the Klamath County Circuit Court has already assumed jurisdiction of the

res, and has jurisdiction to decide all issues necessary to disposing of the *res*. In fact, the Government has affirmatively argued as much before.

Instead, the Government seeks to construct and then defeat various strawman arguments that KID has not made. For instance, KID does not seek by its motion for preliminary injunction to resolve every issue that "incidentally" touches upon water in the Klamath Basin. Nothing about KID's preliminary injunction motion seeks to resolve what Reclamation's obligations under the ESA are or are not. Nor does KID argue—here or in any other court—that the Klamath County Circuit Court is now the sole arbiter of ESA decisions. Indeed, KID's limited objection to the Klamath Tribes' recent temporary restraining order filed in this Court simply noted that the Court could not and should not make decisions purporting to "allocate" the water in UKL, as doing so might implicate the parties' water rights. *See Klamath Tribes v. Bureau of Reclamation*, Case No. 1:21-cv-00556-CL, ECF No. 28, at 19 (D. Or. April 23, 2021) ("To the extent [the Klamath Tribes'] requested injunctive relief could be read to implicate property rights at issue in the Klamath Adjudication, or request that this Court decide who has the right to use the water in UKL, it must be rejected."); *id.* at 21 ("In other words, this Court may not simply 'allocate' a certain amount of water to the Klamath River and a certain amount of water to UKL. The Court may decide how much water Reclamation *needs* to meet its ESA obligations, but the Court lacks jurisdiction to simply divide that water."). The Court apparently accepted this argument, noting at the hearing that it would not be making decisions on allocation.

The underlying motion at issue here simply seeks to have the Government recognize that its rights to the use of water in UKL are the rights determined in the ACFFOD. The underlying motion says nothing about the Government's obligations under the ESA. To the extent the Government does not currently have the water rights it needs to meet its obligations under the ESA, there are numerous ways for the Government to lawfully obtain the right to use water in a manner that will enable it to satisfy its ESA obligations. The Government's preference to avoid doing this, whether out of expediency or cost, provides no justification for violating the law. But that is all KID seeks to establish: that the Government, as a water rights holder under the Klamath Adjudication, must follow the ACFFOD, just as all other water rights holders in the Klamath Basin must follow the ACFFOD. There are certainly other issues that other courts will need to decide, such as what Reclamation's obligations

are under the ESA. While those decisions may be informed by the Klamath County Circuit Court's decisions on Reclamation's water rights, they will remain separate decisions. But the critical issue, which is undisputed by Reclamation, is that the *state court* has clear, prior, and exclusive jurisdiction to make determinations about the water rights at issue in the Klamath Adjudication.

III. CONCLUSION

When a court assumes *in rem* jurisdiction over property, it assumes jurisdiction for the purpose of deciding all issues related to the ownership of or interests in that property. This is expressly the system the McCarran Amendment was designed to create: a state-based, *in rem* proceeding in which *all* water rights issues could be heard, litigated, and decided. The Government's efforts to now carve out certain rights from that determination fundamentally undermine the purpose of the McCarran Amendment and comprehensive water rights adjudications. If the Government is allowed to collaterally attack these proceedings, or withhold claims of entitlements or rights from these proceedings, the comprehensive nature of the state proceedings will be eviscerated. This is what the Supreme Court noted the McCarran Amendment was designed to guard against. Subjecting all of the Government's water rights claims to state adjudication is not a bug in the system; it is the system's express purpose.

The Government's other arguments are simply irrelevant. KID does not assert that each and every issue that incidentally relates to water in the Klamath Basin is subject to the exclusive jurisdiction of the Klamath County Circuit Court. Indeed, it has not argued this in any of the pending ESA cases that remain ongoing. But the questions posed in ESA cases are what Reclamation's *obligations* are. They say nothing about what Reclamation's property rights are, or how Reclamation may use particular pieces of property to satisfy its obligations. KID urges the Court to follow well-established law and remand this motion for preliminary injunction to the Klamath County Circuit Court.

[signatures on next page]

Dated: May 11, 2021.

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CERTIFICATE OF COMPLIANCE

This brief complies with the applicable word-count limitation under LR 7-2(b) because it contains 8,444 words, including headings, footnotes, and quotations, but excluding the caption, table of contents, table of cases and authorities, signature block, exhibits, and any certificates of counsel.

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